

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Plaintiffs,

v.

FEDERAL BUREAU OF INVESTIGATION,  
UNITED STATES DEPARTMENT OF JUSTICE,

Defendants.

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) Civ. A. No. 1:05-CV-1004 (ESH)  
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Exhibit D to Coppolino Declaration



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## 2004 Supreme Court Ends Term With Stirring Words on Religious Liberty

The Supreme Court ended its 2004 Term by strongly reaffirming the principle that government should not be in the business of promoting religion.

The end of the Term may also have signaled the end of an era, with rumors swirling that Chief Justice Rehnquist may soon step down after leading the Court for 19 years. Whether or not those rumors are accurate, it was a Term in which the Chief Justice was on the losing side of many of the ideological battles he has fought so vigorously throughout his judicial tenure.

### COURT NEWS

[O'Connor Replacement Could Roll Back Vital Civil Liberties Protections](#)

"The Court's civil liberties record this year was a surprisingly positive one," said Steven R. Shapiro, the ACLU's national legal director. "In contrast to past years, the Justices seemed less anxious to undermine meaningful civil rights enforcement, more skeptical about the death penalty, and more willing to look at international law for whatever guidance it can provide in resolving fundamental human rights issues."

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### SEARCH AND SEIZURE

Illinois v. Caballes 03-923

#### DECIDED

Reviewing whether a police can expand a routine traffic stop into a drug investigation by using a drug-sniffing dog in the absence of individualized suspicion.

### WOMENS' RIGHTS

Castle Rock v. Gonzales 04-278

#### DECIDED

Reviews whether local governments and police can be held accountable for failing to enforce court orders to protect victims from a violent spouse or acquaintance.

Jackson v. City of Birmingham 02-1672 DECIDED

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### RELIGIOUS LIBERTY

McCreary County v. ACLU 03-1693

#### DECIDED

Challenges the constitutionality of Ten Commandments displays posted in Kentucky courthouses. Cutter v. Wilkinson 03-9877

#### DECIDED

Reviewing the constitutionality of the Religious Land Use and Institutionalized Persons Act, a federal law designed in part to protect the free exercise rights of prisoners and other institutionalized persons.

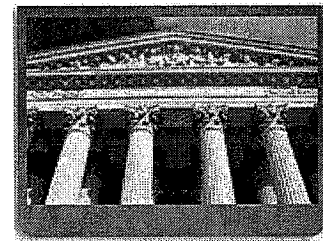
### CRIMINAL JUSTICE/RIGHTS OF THE POOR

Halbert v. Michigan 03-10198

#### DECIDED

Challenging a Michigan law Michigan law that denied poor people the right to legal representation.

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**DECIDED**

Challenging Tax Court practice  
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**PRISONERS' RIGHTS/RACIAL  
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Wilkinson v. Austin 04-495

**DECIDED**

Reviewing the procedures  
required by due process before an  
Ohio prisoner can be transferred  
to the state's "Supermax" facility.  
Jay V. Johnson v. California  
04-6964 **DECIDED**  
Reviewing the procedure by  
which a defendant can establish  
that the prosecution improperly  
used its peremptory jury  
challenges in a racially  
discriminatory fashion.

Garrison S. Johnson v. California  
03-636 **DECIDED**

Reviewing whether California's  
policy of racially segregating all  
new prisoners should be subject  
to strict judicial scrutiny.

**FREE SPEECH**

MGM. v. Grokster 04-480

**DECIDED**

Reviewing if developers of  
software that allows for  
peer-to-peer file sharing can be  
held liable if that software is used  
by some consumers for copyright  
infringement when it is also  
capable of substantial  
non-infringing uses.

FCC v. Brand X 04-281

**DECIDED**

Reviewing if the government will  
regulate monopolistic providers  
of Internet access.

**DECIDED**

Reviewing whether indigent  
criminal defendants in Michigan  
are entitled to appointed counsel  
on their first appeal, even if they  
plead guilty.

**DEATH PENALTY**

Roper v. Simmons 03-633

**DECIDED**

Challenging the constitutionality of  
the juvenile death penalty.

**IMMIGRANTS' RIGHTS**

Benitez v. Mata 03-7434

**DECIDED**

Reviewing the government's claim  
that "Mariel" Cubans can be  
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they have been found excludable  
from the United States and Cuba  
will not allow their return.

Leocal v. Ashcroft 03-583

**DECIDED**

Challenge to expansive  
interpretation of immigration law  
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deportation of aliens convicted of  
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Muehler v. Mena 03-1423

**DECIDED**

Challenging the length, nature, and  
scope of the police detention of a  
lawful permanent resident during a  
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**Counsel****PREVIOUS TERMS**

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## Supreme Court Ends Term with Stirring Words on Religious Liberty

June 28, 2005

The Supreme Court ended its 2004 Term by strongly reaffirming the principle that government should not be in the business of promoting religion.

"Americans may count themselves fortunate," Justice O'Connor wrote. "Our regard for constitutional boundaries has protected us" from the religious violence that plagues so much of the world, "while allowing private religious exercise to flourish."

The end of the Term may also have signaled the end of an era, with rumors swirling that Chief Justice Rehnquist may soon step down after leading the Court for 19 years. Whether or not those rumors are accurate, it was a Term in which the Chief Justice was on the losing side of many of the ideological battles he has fought so vigorously throughout his judicial tenure.

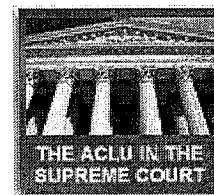
"The Court's civil liberties record this year was a surprisingly positive one," said Steven R. Shapiro, the ACLU's national legal director. "In contrast to past years, the Justices seemed less anxious to undermine meaningful civil rights enforcement, more skeptical about the death penalty, and more willing to look at international law for whatever guidance it can provide in resolving fundamental human rights issues."

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Steven Shapiro, [bio](#)  
ACLU National Legal  
Director

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### RELIGIOUS LIBERTY

As always, the Court issued a series of important decisions on its final day. Two of those decisions involved the Ten Commandments and produced the Court's most important discussion of religious liberty in many years. In *McCreary County v. ACLU of Kentucky*, the Court held that the

Establishment Clause barred a courthouse display of the Ten Commandments. As Justice O'Connor stated in her concurring opinion: "Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of religious beliefs. Tying secular and religious authority together poses risks to both."

In *Van Orden v. Perry*, the Court upheld a Ten Commandments monument that had sat for many years on the Texas state capitol grounds. The difference between the two cases, however, had more to do with the facts than the law. Justice Breyer, who provided the crucial fifth vote, concluded that the Texas monument did not convey a primarily religious message, largely because it had been in place for more than 40 years without apparent objection and because it is one of 17 monuments and 21 historical markers on the grounds. At the same time, he agreed with the principle that the government could not use a Ten Commandments display to promote a religious message.

Religious freedom scored another victory in *Cutter v. Wilkinson*, when the Court upheld the constitutionality of the Religious Land Use and Institutionalized Persons Act by a unanimous vote. The Court and Congress have been going back and forth for more than a decade on the power of Congress to protect religious liberty. This time, the Court concluded that Congress did not violate the constitutional prohibition against establishing religion when it enacted a law designed to protect the religious rights of institutionalized persons against government interference, a position that the ACLU supported first in Congress and then in litigation.

#### FREE SPEECH

The Court's flurry of final-day decisions also included two troubling cases addressing speech on the Internet. In *MGM v. Grokster*, the Court held that the developers of peer-to-peer file sharing software can be held liable under certain circumstances if their software is used in violation of the copyright laws by individual consumers. The impact of that decision on future Internet innovation may well depend on how broadly or narrowly the Court's decision is ultimately read. And, in *FCC v. Brand X*, the Court held that cable companies with broadband Internet access can limit the number of Internet Service Providers available to their customers.

#### TRIAL BY JURY

Somewhat atypically, one of the Court's most far-reaching decisions occurred relatively early in the Term. In *United States v. Booker*, a 5-4 majority of the Court declared the federal Sentencing Guidelines unconstitutional to the extent that they permitted a judge to impose a prison sentence based on judicially determined facts that the defendant had never admitted and no jury had ever found beyond a reasonable doubt. A separate 5-4 majority then ruled that the solution to this constitutional flaw was to make the Sentencing Guidelines advisory rather than mandatory. It is still too early to tell what the practical impact of this decision will be, but thousands of federal sentences each year are potentially affected.

#### DEATH PENALTY

There is no uncertainty about the practical impact of the Court's decision in *Roper v. Simmons*, which struck down the juvenile death penalty as a form of cruel and unusual punishment. Just last week, the Governor of Texas commuted 28 death sentences imposed on defendants who were under 18 at



the time they committed their capital offenses. The opinion in *Roper* was written by Justice Kennedy, who also wrote the Court's opinion two Terms ago in *Lawrence v. Texas*, striking down that state's consensual sodomy law. In *Roper*, as in *Lawrence*, Justice Kennedy sought support for his constitutional holding by looking to international law and practice. Among other things, he pointed out in *Roper* that no other country in the world officially condones juvenile executions, and only one other country in the world has declined to ratify the United Nations Convention on the Rights of the Child, which expressly forbids juvenile executions.

Although the Members of the Court have been debating the relevance of international law, both in their published opinions and in other public statements, the decision in *Roper* may well indicate that the debate has now been largely resolved. Including Justice O'Connor, who otherwise dissented, there were six votes in *Roper* clearly rejecting Justice Scalia's view that international law should never be considered in deciding how to interpret our own Constitution.

*Roper* was also emblematic of what appears to be the Court's increasing discomfort with the arbitrary and discriminatory manner in which capital punishment is too frequently imposed. That attitude led to an unusually large number of reversals in death cases this year. For example, in *Miller-El v. Dretke*, the Court vacated a death sentence because of the prosecutor's discriminatory use of peremptory challenges during jury selection. In *Smith v. Texas*, the Court vacated a death sentence because of an improper jury instruction on the use of mitigating evidence. In *Rompilla v. Beard*, the Court vacated a death sentence because of ineffective assistance of counsel. In *Bradshaw v. Stumpf*, the Court vacated a death sentence to allow further consideration of a claim that the prosecution improperly charged two separate defendants in successive trials with being the triggerman in the same murder. In *Deck v. Missouri*, the Court ruled that a defendant could not be shackled in front of the jury during the penalty phase of a capital trial absent a specific finding of need by the trial judge. And, in *Medellin v. Dretke*, foreign nationals won the right to contact their embassy when charged with capital crimes after the President agreed as a matter of "comity" to abide by a ruling of the International Court of Justice, leading the Supreme Court to dismiss the writ of *certiorari* as improvidently granted.

#### SEARCH & SEIZURE

The Court's major Fourth Amendment ruling this year was a disappointment when it held, in *Illinois v. Caballes*, that the police do not need individualized suspicion to have a drug-sniffing dog examine a car that has been stopped for a routine traffic infraction. Because it viewed the case solely in Fourth Amendment terms, the Court's opinion did not even mention the well-documented problem of racial profiling that so often plagues traffic stops.

#### WOMEN'S RIGHTS

In a far more tragic context, the Court issued another antiseptic opinion in *Castle Rock v. Gonzales* when it ruled that a mother whose three children were murdered by her estranged husband could not assert a due process claim against the police for failing to enforce a protective order without explanation despite her repeated pleas for their intervention on the night of the murders.

## CRIMINAL JUSTICE/RIGHTS OF THE POOR

By contrast, in *Halbert v. Michigan*, one of four ACLU cases on the docket this Term, the Court took a more realistic view of the criminal justice system when it held that indigent defendants cannot be denied appointed counsel on their first appeal from a guilty plea. Likewise, in *Wilkinson v. Austin*, a case in which the ACLU served as co-counsel, the Court recognized that prisoners confined in Ohio's supermax prison suffer an "atypical and significant hardship" that demands due process safeguards, even though it subsequently ruled that the procedures Ohio put in place during the course of the litigation were constitutionally sufficient.

## DISCRIMINATION

The Court's record in discrimination cases this year was also encouraging. In *Garrison Johnson v. California*, the Court rejected the state's claim that it should be given virtual *carte blanche* to racially segregate all prisoners during a 60-day classification period in the name of prison safety. In *Smith v. City of Jackson*, the Court ruled that the federal Age Discrimination in Employment Act prohibits employment practices that have a discriminatory impact on older workers without justification and not just those employment practices that are motivated by a discriminatory purpose. In *Jackson v. Birmingham Board of Education*, the Court held that Title IX protects individuals who report sex discrimination in education along with those who suffer from it, and that both can sue for a violation of their rights. Finally, in *Spector v. Norwegian Cruise Lines*, the Court ruled that the Americans with Disabilities Act requires foreign-flag ships that dock in American ports to provide "readily achievable" accommodations that meet the needs of passengers with disabilities.

## IMMIGRANTS' RIGHTS

There were two significant immigration victories, as well. In *Clark v. Martinez*, the Court held that even so-called excludable aliens, like the Mariel Cubans in this case, are presumptively entitled to release from immigration detention if the government has been unable to enforce a removal order within six months. In *Leocal v. Ashcroft*, the Court held that a drunk driving conviction is not a "crime of violence" under federal law and is therefore not a basis for mandatory deportation.

These rulings stand in stark contrast to the Court's response on two issues that have been a centerpiece of the conservative agenda during the Rehnquist era. The first is property rights. In *Kelo v. City of New London*, the Court rejected the claim of property owners that the city had exceeded its powers of eminent domain by taking their land (with just compensation) to further the city's economic redevelopment plan. Similarly, the Court's unanimous decision in *Lingle v. Chevron* will make it more difficult for businesses to challenge the government's economic regulations as a violation of the Takings Clause.

## PROPERTY RIGHTS

The second issue involves federal-state relations, albeit in situations that may have scrambled the usual politics. The instinct of the Rehnquist Court has been to favor the states in such disputes. But, in *Gonzales v. Raich*, the Court embraced a broad interpretation of the Commerce Clause that allows the federal government to prosecute individuals who grow marijuana for their own medical use despite California's decision to legalize it as a matter of state law. And, in *Grainholm v. Heald*, the Court ruled that the Commerce Clause



does not allow individual states to bar out-of-state wineries from selling directly to in-state residents.

"This past Term was a relatively quiet one for the Court," Shapiro said, "but that is unlikely to last. The Court's docket for next Term already includes abortion and the right-to-die. In addition, important cases involving campaign finance and the war on terrorism seem headed for the Court. And, of course, a Supreme Court nomination battle will remind our nation once again of the central role that the Supreme Court plays in American life."

Summary of all of the Court's civil-liberties related cases from this Term is online (PDF).

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